

NO. 48652-1-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON DIVISION TWO

STATE OF WASHINGTON
v.
RAYMOND E. JENSEN

ON APPEAL FROM
THE SUPERIOR COURT FOR GRAYS HARBOR
COUNTY
STATE OF WASHINGTON

The Honorable David Edwards, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that Jensen committed theft in the second degree

2. Jensen assigns error to the trial court's conclusion 2 that by color or aid of deception Jensen took the property of another with intent to deprive Hickie of \$5000.

Issues Presented on Appeal

1. Did the state fail to prove beyond a reasonable doubt that Jensen intended to deprive the owner of her \$5000 when he had family troubles that delayed his ability to conclude his contractual agreement with Hickie to sell her a horse trailer for \$5000?

2. Did the state fail to prove beyond a reasonable doubt that Jensen took the property of another when Hickie agreed to give Jensen the money in exchange for a trailer?

3. Did the state fail to prove beyond a reasonable doubt that Jensen color or aid of deception took \$5000 from Hickie where the evidence revealed that he had family troubles that delayed his ability to conclude his contractual agreement?

B. STATEMENT OF THE CASE

a. Procedural Facts.

Raymond Jensen was tried by the bench for theft in the second degree by aid of deception. CP 1-5. He was found guilty as charged. CP 13-26. This timely appeal follows. CP 38.

Jensen challenges conclusions of law 5 and 6, which find that Jensen's reasons for not delivering the trailer were disingenuous and that the image of the trailer on the google ad was for the same trailer that Jensen owned. CP 13-15.

Jensen challenges the court's conclusion 2 which provides as follows:

The court finds beyond a reasonable doubt:

(1) That on or about March 19, 2015, the defendant by color or aid of deception, obtained control over property of another;

(2) That the property exceeded \$750 in value but did not exceed \$5,000;

(3) That the defendant intended to deprive the other person of the property; ...

CP 13-15.

b. Substantive Facts.

Angela Ostenson met Jensen through an online singles

dating website and dated him a few times. RP 18-19. Jensen indicated that he had a six horse trailer for sale for \$5000. RP 7. Ostenson informed her friend Tami Hickle who wanted to purchase the trailer for \$5000. RP 19-21. Hickle never saw the trailer but saw a photograph provided by Jensen to Hickle via Ostenson. RP 13, 20-24. Hickle met Jensen at the fairgrounds where she gave him \$5000 in exchange for his promise to deliver the trailer two days later. RP 9, 23. Hickle did not obtain title to the trailer or a receipt. RP 10-11.

Jensen informed Hickle and Ostenson that he could not deliver the trailer because his mother died, his father was struggling with the death, the trailer was in Spokane and Jensen also had family in Pittsburg where a google image of the trailer was taken. RP 23-26. Jensen finally agreed to return the \$5000 to Hickle, but failed to meet Ostenson on behalf of Hickle at the designated time. RP 16, 27-28. Jensen later admitted that he no longer had the money because he needed it to pay his payroll taxes after a job failed to pay him for the work completed. RP 7, 14, 24, 26. Jensen never said that he would not return the money.

C. ARGUMENTS

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT JENSEN INTENDED TO DEPRIVE THE OWNER OF \$5000, OR THAT HE TOOK THE PROPERTY OF ANOTHER BY AID OR COLOR OF DECEPTION WITH INTENT TO DEPRIVE.

Jensen challenges the trial court's specific findings of fact 5 and 6 and conclusion of law 2, on grounds that substantial evidence does not support the findings and the findings do not support the conclusion. The evidence suggested simple breach of contract, not theft in the second degree.

Due process requires the State to prove every element of the charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253, (2015). To determine if the State presented sufficient evidence, this Court views the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Condon*, 182 Wn.2d 307,

314, 343 P.3d 357 (2015).

An appellant's claim of insufficient evidence admits the truth of the State's evidence and "all inferences that reasonably can be drawn [from it]." *Condon*, 182 Wn.2d at 314 (alteration in original) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

a. Standard of Review For Findings.

Following a bench trial, review is limited to determining whether substantial evidence supports the challenged findings and, if so, whether the findings support the conclusions of law. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Unchallenged findings of fact are verities on appeal, and a trial court's conclusions of law are reviewed de novo. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d (91997); *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

b. Theft Second Not Committed

Theft in the second degree as charged in this case provides:

(1) A person is guilty of theft in the second degree if he or she commits theft of:

(a) Property or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value, other than a firearm as defined in RCW 9A.010 or a motor vehicle;

CP 4-5; RCW 9A.56.040.

(1) "Theft" means:

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or

RCW 9A.56.020(1)(b).

The court entered findings and conclusions that the state proved beyond a reasonable doubt that: (1) Jensen made up disingenuous excuses for not providing the trailer; (2) the trailer was the same as seen in a google ad in Ohio; (3) "by color or aid of deception", Jensen obtained the \$5000 with intent to deprive the owner of her property. RCW 9A.56.020(1)(a); and (4) Jensen intended to deprive Hickie of the \$5000. CP 13-15.

"By color or aid of deception" means "that the deception

operated to bring about the obtaining of the property or services; it is not necessary that deception be the sole means of obtaining the property or services. RCW 9A.56.010(4).

i. Insufficient Evidence That
Jensen Unlawfully
Obtained \$5000 By Color
or Aid By Deception With
Intent To Deprive..

Here, Hickie authorized Jensen to retain the \$5000 she provided it in exchange for the promised horse trailer. RP 6, 9. Because Jensen was authorized to take these finds, he did not wrongfully obtain the money initially. Rather he was authorized by contract to obtain the money. Accordingly, Jensen can be guilty of theft only if he obtained the money by aid of deception with intent to deprive Hickie of her \$5000.

Here, the state failed to present sufficient evidence to demonstrate that Jensen committed theft “by color or aid of deception.” RCW 9A.56.020(1)(a). “Deception’ includes a broad range of conduct, including ‘not only representations about past or existing facts, but also representations about future facts, inducement achieved by means other than conduct or words, and

inducement achieved by creating a false impression even though particular statements or acts might not be false.” *State v. Mehrabian*, 175. 678, 700, 308 P.3d 660 (2013) (quoting, *State v. Casey*, 81. 524, 528, 915 P.2d 587 (1996)).

In the context of an unsecured loan made upon a promissory note, title to the funds pass to the borrower when he signs the note. *State v. Gillespe* 41. 640, 645, 705 P.2d 808 (2002). However, if the borrower uses the funds for a different purpose than proposed, the borrower cannot be guilty of embezzlement. *Gillespe* 41. at 645. Gillespe breached his agreement to use the bank loan proceeds for something other than a boat to which the bank could obtain title.

Here, similar to *Gillepse*, Jensen obtained \$5000 by agreement to provide a trailer. When Jensen was unable to deliver the trailer or return the funds, he like Gillepse had not taken the property of another by aid of deception. Rather, like the bank loan, Hickie gave Jensen \$5000 without receiving title or any security. RP 6, 9. As in *Gillespe*, Jensen did not commit the crime of theft.

Jensen wanted to sell his trailer but had trouble obtaining it for Hickie due to complications beyond his control. RP 24-28. Thereafter, Jensen agreed to refund Hickie her money but also had trouble doing this because he had already spent the funds. RP 14, 26. The state did not present any evidence to refute Jensen's efforts to return the cash and did not present any evidence to suggest that Jensen's problems were invalid.

The presentation of a photo on a google ad did not demonstrate Jensen obtained the \$5000 by aid or deception because it did not establish that the Jensen's trailer was the same trailer, rather than a 'dead-look alike'. The evidence did not establish that Jensen did not have access to the trailer he claimed to own, or that he did not intend to provide the trailer to Hickie or to refund her \$5000. Jensen promised to repay Hickie and had difficulty doing so. The evidence presented at trial was insufficient to establish the elements of theft by aid or deception. The court merely speculated.

ii. Not Property of Another.

The meaning of "property of another" is derived from the

definition of “owner.” *State v. Pike*, 118 Wn.2d 585, 595, 826 P.2d 152 (1992). The definition of “owner” “establishes the level of interest necessary to claim a right to property.” *Pike*, 118 Wn.2d at 589. The statute defines “owner” as “a person, other than the actor, who has possession of or any other interest in the property or services involved, and without whose consent the actor has no authority to exert control over the property or services.” RCW 9A.56.010(11).

Because Hickle voluntarily gave Jensen the \$5000 and did not have title or security for the \$5000, once she handed over the cash, it was no longer hers. *Pike*, 118 Wn.2d at 589; 9A.56.010(11). Accordingly, the \$5000 was no longer the “property of another”.

iii. No Intent to Deprive.

Possession alone does not support an inference of intent to commit a crime. *State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013). When intent is an element of a crime, it may be inferred “ ‘if the defendant’s conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability.’ “

Vasquez, 178 Wn.2d at 8 (internal quotations omitted). Rather, the state must offer possession together with some corroborating evidence. *Vasquez*, 178 Wn.2d at 8

For example, in *Vasquez*, the issue was whether the evidence was sufficient to show the intent to injure or defraud that is needed to prove forgery. *Vasquez*, 178 Wn.2d at 13. The court held that the defendant's possession of forged identification cards alone was not sufficient to prove the necessary intent, and noted that the defendant's ready admission to a security guard that the cards were forged refuted the intent that he intended to defraud the guard. *Vasquez*, 178 Wn.2d at 14-16.

Here, there was insufficient evidence that Jensen intended to deprive Hickie of her \$5000. He, like the defendant in *Vasquez* readily admitted that he was having trouble obtaining the trailer and agreed to repay the funds. RP 24-28. Just because he was having trouble doing so did not establish beyond a reasonable doubt an intent to deprive. Like *Vasquez's* ready admission to the guard about the forged cards, Jensen's willingness to acknowledge his debt and his agreement to repay, refuted an intent to deprive.

Accordingly, the state failed to prove that Jensen committed theft in the second degree because the evidence was insufficient to establish intent to deprive.

2. JENSEN BREACHED A
CONTRACTUAL AGREEMENT.

When Jensen failed to deliver the trailer or return the \$5000, he breached a contract with Hickle.

a. Elements of Contract

The essential elements of a contract are ‘the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration.’ “*Bogle & Gates, PLLC v. Holly Mountain Res.*, 108. 557, 561, 32 P.3d 1002 (2001) (quoting *DePhillips v. Zolt Constr. Co. Inc.*, 136 Wn.2d 26, 31, 959 P.2d 1104 (1998)).

b. Standard of Review For Breach of Contract

“The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention.’ “*Holly Mountain Res.*, 108. at 560 (quoting, *Cahn v. Foster & Marshall, Inc.*, 33. 834, 840, 658 P.2d 42, review denied, 99 Wn.2d 1012

(1983)).

Any failure to perform a contractual duty when the time for performance has accrued constitutes a breach. *Seabed Harvesting, Inc. v. Department of Natural Resources*, 114. 791, 797, 60 P.3d 658 (2002) (defendant breached a clear contractual duty by failing to procure liability insurance for the benefit of plaintiff). Restatement (Second) of Contracts § 235 (2)(1981).

A person breaches a contract when the person has a prospective inability or unwillingness to perform may be manifested by word or conduct, destruction of the subject matter, death or illness of a person whose performance is essential under the contract. Calamari & Perillo, Contracts § 12.2 at 426 (6th ed. 2009); Restatement (Second) of Contracts § 280-287. Inability to perform may also be manifested by encumbrance or lack of the title by the seller at the time of the making of the contract, or a sale of the property by the subsequent to the making of the contract, or insolvency of a party. *Id.* Jensen's failure to deliver the trailer was a breach of contract not theft.

c. Contract Facts and Breach.

In this case, all of the elements of a contract and breach were present. First, the parties were established: Jensen and Hickle. Second, Jensen made a promise to pay two days after receipt of the \$5000. Third, the terms and conditions were set forth: payment in exchange for delivery of the trailer. Finally, the parties agreed on a price of \$5000. These are precisely the elements of a contract. *Bogle & Gates, PLLC*, 108. at 561, (quoting *DePhillips*, 136 Wn.2d at 31.

Once the cash was provided, Jensen, pursuant to the oral agreement was to deliver to Hickle, the trailer two days after receipts of the \$5000. RP 9-11, 21, 23. When Jensen failed to deliver the trailer and failed to return the cash, he breached the verbal contract with Hickle. *Seabed Harvesting, Inc.*, 114 Wn. App. at 797, 799. Breach of contract here does not satisfy the elements of theft in the second degree because there is no longer the property of another, there is no intent to deprive and there is no deception.

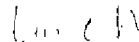
Accordingly, this Court must reverse the theft conviction and remand for dismissal with prejudice

D. CONCLUSION

Mr. Jensen respectfully requests this Court reverse and remand for dismissal with prejudice his conviction for theft in the second degree for insufficient evidence.

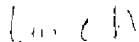
DATED this ____ day of September 2016

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor at Gfuller@co.grays-harbor.wa.us wleraas@co.grays-harbor.wa.us and Raymond Jensen DOC# 858234 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed, on September 13, 2015. Service was made electronically to the prosecutor and via U.S. Mail to Mr. Jensen.



Signature

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